Filed 1/27/16 P. v. Keith CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RALPH BRADLEY KEITH, Defendant and Appellant.	F066935 (Super. Ct. No. 1410346) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Marie S. Silveira, Judge.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Marcia A. Fay, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Following a real property dispute with his neighbor, a jury convicted appellant Ralph Bradley Keith of discharging a firearm in a negligent manner (Pen. Code, § 246.3, subd. (a); count 2)[1] and misdemeanor resisting arrest (§ 148, subd. (a)(1); count 5). Appellant was found not guilty of assault with a deadly weapon (§ 245, subd. (a)(2); count 1); making a criminal threat (§ 422; count 3); and felony vandalism (§ 594, subd. (b)(1); count 4). The trial court suspended imposition of sentence and placed him on probation for three years with certain terms and conditions, including serving 240 days in county jail.

On appeal, appellant raises six issues. First, the trial court conducted an in camera review before trial pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) regarding the personnel records of two sheriff deputies involved in his arrest. Appellant asks this court to conduct an independent review of that process.

Second, appellant contends the trial court erred when it allowed into evidence a statement from his wife regarding his alleged motive for the confrontation with his neighbor. Third, he argues the prosecution presented insufficient evidence that he fired his gun in a negligent manner. Fourth, he maintains that the prosecution violated its due process obligations under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) by failing to disclose evidence concerning prior acts of misconduct by his neighbor. Fifth, he asserts the trial court erred when it denied his motion for a new trial. Finally, he claims the trial court violated his ex post facto rights when it imposed a restitution fine and a parole revocation fine greater than the statutory minimum in place in 2009 when he committed these crimes.[2]

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[1] All future statutory references are to the Penal Code unless otherwise noted.

[2] Appellant incorrectly asserts a *parole* revocation fine was imposed pursuant to section 1202.45, in addition to the restitution fine. To the contrary, the trial court imposed a *probation* revocation restitution fine pursuant to section 1202.44, in addition to the restitution fine.

We find no prejudicial error regarding appellant's *Pitchess* motion and appellant's claims are without merit. We affirm the judgment.

BACKGROUND

I. Trial Facts

A. Prosecution's evidence

Beginning in approximately April 2008, appellant and Theodore Cummins were neighbors. Cummins and appellant had a dispute over their common property line that escalated after Cummins hired a survey company, which marked the property line, and Cummins hired a fencing contractor to erect a new fence. The contractor removed an old wire fence that appellant had installed. While the fencing contractor was installing the new fence, appellant and his wife, Debi Bonsack, angrily informed the contractor he was installing it in the wrong location.

Bonsack contacted law enforcement, complaining that the contractor had destroyed their fence. A deputy responded and spoke with the contractor, who indicated Cummins had hired him and he was following the markers from the survey company. The deputy determined this was a civil matter.

The following day, the fencing contractor returned to complete the job and he discovered that all of the erected fence posts had been pulled out and thrown into a pond. Cummins notified law enforcement and another deputy responded, but he could not make contact with anyone at appellant's residence. The contractor resumed work. Later that night, Cummins inspected the work and he observed appellant ripping out the fence posts. Cummins confronted appellant, who said the fence was in the wrong spot. Cummins said he would call 911 to have appellant arrested, and appellant said he would kill Cummins. However, Cummins told the jury he did not take appellant's statement as a real threat.

Cummins called 911, which call was played for the jury. During his 911 call, Cummins stated appellant was tearing down his fence with a tractor and he was scared

because appellant had threatened to kill him. Appellant left while Cummins was on the telephone with 911.

After hanging up with 911, Cummins called the contractor. While speaking with the contractor, Cummins heard a loud boom and noise in the brush four feet from him. He looked up and saw appellant by appellant's barn. Cummins believed appellant shot at him but he could not see anything in appellant's hands. Cummins ran away.

As he ran, Cummins heard a second shot and then noise in front of him in the direction he was running. Cummins dove behind cover and called 911. The second 911 call was played for the jury. During his call, Cummins said he was hiding and scared because appellant shot at him twice. He said he could hear appellant walking in the brush and appellant's shot had barely missed him.

Law enforcement responded to appellant's residence and a dispatcher contacted appellant by telephone at approximately 7:06 p.m. The telephone call was played for the jury. Appellant denied shooting at Cummins and stated Cummins threatened to kill him that night while holding a pipe. Appellant complained that Cummins had ripped out his fence the day before and was building a fence in the wrong location. Appellant admitted he had fired his gun that night, but claimed he fired at a stray cat and he was 300 feet from Cummins.

Law enforcement set up a perimeter outside appellant's residence. Dispatch contacted appellant a second time to ask him to exit his residence. The second call was played for the jury. When asked where his guns were located, appellant stated he was eating dinner and that was "private business," but he then stated his guns were not within 300 yards of him. He informed the dispatcher that the deputies should knock on his door if they wanted to speak with him. He said his neighbor was in the wrong.

Appellant eventually exited his house yelling, cursing and waving his arms. Appellant informed the deputies they should deal with his neighbor. Deputies ordered appellant to show his hands, turn around, and get on the ground. Appellant did not

comply. At times appellant raised his hands but he then dropped them down to his waist. At one point, appellant did a complete revolution and then stated he was going back inside his house. Appellant began walking towards his residence and the deputies yelled at him to get on the ground. Appellant went down to his knees after walking five to 10 feet. A deputy approached and ordered him to lie down, and appellant complied. Appellant was handcuffed and read his *Miranda*[3] rights.

Deputies located and seized a rifle and shotgun in appellant's barn. A deputy interviewed appellant and recorded the conversation, which was played for the jury. During the interview, appellant indicated he was a good shot. He said Cummins stole his "No Trespassing" signs and tore down his fence. Appellant was by the fence trying to retrieve his signs when Cummins came at him with a pipe and said he was going to rip off appellant's head. Appellant said he fired into some trees because Cummins was telling some friends to come "take care" of him. He agreed with the deputy that he fired into the air to scare Cummins. When asked where he pointed his gun, appellant indicated a particular location and the deputy asked if appellant knew Highway 108 was in that direction. Appellant indicated he did not realize that. The deputy told appellant they needed to find the spent shells in the general area where appellant said he fired or else it would look bad for appellant.

Another deputy spoke with appellant. Appellant said he shot to scare a cat and he denied shooting at Cummins. Appellant indicated he and Cummins were involved in a verbal argument at the fence line and Cummins threatened to kill him with a pipe. Appellant retreated to his home, and retrieved a rifle and a shotgun. He went outside and shot in an easterly direction, about 20 feet in the air towards a tree. Appellant said he fired to scare Cummins, but not to kill him.

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3 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Deputies searched the general area for about 20 minutes where appellant indicated he fired the first round. They were unable to locate a spent shell. They also checked a second location because appellant indicated he moved after he fired the first round and he shot a second time. Appellant, however, was not sure of the second location, so deputies searched an area near appellant's barn that provided a line of sight to where Cummins said the bullet hit in front of him. No spent shell casings were located at that second spot.

Highway 108 and another road are to the south of appellant's property. An undefined number of homes exist within 1,000 feet to the east and west of appellant's property. A road exists about 200 feet to the north of appellant's property.

B. Defense evidence

Appellant's daughter, brother, a stepdaughter, and some family friends testified regarding Cummins's behavior and appellant's reputation for peacefulness. Cummins would often park near appellant's property line and spend hours watching the activities occurring on appellant's property. Cummins sometimes parked with music blaring or at night with his vehicle's lights shining onto appellant's property. Appellant's brother recalled an incident where he witnessed Cummins become irate with an official from a local irrigation district. Cummins drove up quickly to the official, skidded on the dirt road causing dust to fly everywhere, and he exited his truck yelling and cursing at the official while kicking dirt. Appellant was generally described as being a peaceful person.

A private investigator measured distances from where appellant said he fired his rifle. In that direction are a wooded area, a swamp, a flat plain, a river and then a hill. The ground slopes downwards until it reaches the river. The hill is approximately 700 feet from appellant's stated shooting location.

Appellant testified on his own behalf and said Cummins repeatedly took down his fence. He agreed with his witnesses that Cummins would often sit near the property line and stare at his family. At some point, appellant's wife contacted both the Army Corps of Engineers and the county over concerns Cummins was improperly filling a pond on his

property that served as a flood basin for the local area. Multiple agencies responded to these concerns and held a large meeting regarding Cummins's activities.

Appellant claimed he was generally happy with the new fence because it was installed about two feet into Cummins's property, so it gave appellant additional land. The new fence was an "anti-climb horse fence," which was an improvement over the old barbed wire fence, and better for appellant's livestock.

On the night in question, appellant inspected the fence and saw that someone had moved his "no trespassing" signs onto Cummins's property. Appellant began retrieving his signs. As he did, Cummins drove up quickly and jumped out of his vehicle. Cummins held a pipe in his right hand and he chased appellant back to appellant's property. As he chased appellant, Cummins yelled that he would kill appellant and rip his head off if he ever came back on his property. Cummins stopped and made a phone call. Appellant asked if they could talk about it, and he told Cummins not to bother with the sheriff because they were contacted the day before. Cummins said he was not calling law enforcement, but his fence builder "to take care of [his] ass." This scared appellant, who believed the contractor carried a gun and had a concealed weapons permit.

Appellant ran to his house, and retrieved a rifle and shotgun. He believed someone was going to appear at his house with a gun and he thought about firing a warning round. He considered shooting at a feral cat that ran by, but decided against that. He watched the road for a while to see if someone was coming for him. He decided he did not want a fight. He aimed at a particular tree and fired a single shot in the direction of a group of trees he normally shoots into. He emphasized to the jury that he fired his rifle because he was scared, he believed someone was going to attack him, and he thought it was safe to fire. The spent shell jammed in his rifle, so appellant went to his barn and cleared it with a screwdriver. He fired a second shot at almost the same location and at the same tree to ensure the rifle was working.

Appellant placed his weapons in the barn and returned to his house. He and his wife talked about what happened and made dinner. About 20 to 30 minutes later, he received the telephone calls from the sheriff's dispatcher. He thought it was a joke at first, thinking Cummins's sister was calling him. After the second call, appellant looked out his window and saw multiple deputies, so he exited his house. Multiple lights were shone in his eyes and he received numerous conflicting orders, such as to freeze and also to get on the ground. Appellant was confused, raised his hands and asked what the deputies wanted. He continued to receive conflicting commands. He took a step backwards and said he was going to return to the house and call their dispatcher to figure out what was happening. He heard the sound of guns cocking, so he dove onto the ground on his stomach. He was then handcuffed.

Appellant estimated he was on the ground for over two hours. He was accused of shooting at Cummins, but he told the deputies he fired at the base of the tree. He later changed his story and said he fired 20 feet off the ground at the tree, so the deputies would let him stand up. However, he told the jury his statement to the deputies was not correct and he never fired 20 feet up from the ground.

DISCUSSION

I. Independent Review of the Sealed Record Pertaining to the *Pitchess* Proceedings Reveals No Procedural Error

Appellant requests we independently review the propriety of the trial court's ruling regarding his motion filed pursuant to *Pitchess, supra,* 11 Cal.3d 531. Respondent does not object.

A. Background

On August 31, 2012, appellant filed a *Pitchess* motion to permit discovery and disclosure of all records involving all persons who have complained against or about Deputies Berndt and Knittel, two of the deputies who were involved in his arrest, for "unnecessary acts of aggressive behavior, violence and excessive force, whether on or off

duty at the time of such behavior within the last five years." On September 18, 2012, the trial court granted appellant's *Pitchess* motion and conducted an in camera review of Berndt's and Knittel's personnel records. A court reporter was present and the custodian of records was sworn prior to testifying. The custodian testified that he had no records for the court. The custodian explained that he had examined both Berndt's and Knittel's personnel files, along with internal affairs and citizen complaint files, and he found nothing that fell under the requested information in the *Pitchess* motion. The trial court asked the custodian to prepare a memorandum listing which records were examined so the court could determine if further disclosure was required.[4] Following the in camera review, the court made the following confidential ruling: "Based on the evidence presented the Court finds there is nothing to disclose."

On November 4, 2015, on its own motion, this court ordered the trial court to provide the files it reviewed at the in camera hearing on September 18, 2012, pursuant to appellant's *Pitchess* motion, along with the reporter's transcript of the hearing. On December 18, 2015, the trial court conducted a hearing to verify the records associated with appellant's *Pitchess* motion. The court noted it had not maintained copies of the records associated with the September 18, 2012, in camera review. Under oath, the custodian stated it had all personnel records, citizen complaints, and internal affairs investigations relating to Berndt and Knittel that existed prior to 2012, except for one citizen complaint relating to Berndt from 2007 that had been destroyed in the usual course of record destruction. The custodian explained that citizen complaints and internal affairs files are routinely destroyed after five years unless a civil lawsuit is pending or an order is received from a court. The destruction of such files occurs even if a complaint is sustained, although any record of discipline would remain in the deputy's personnel file.

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4 Such a memorandum does not appear in the appellate record.

The trial court noted on the record that it had reviewed all of the files which the custodian brought, and the court stated that these were the same files which it had reviewed in 2012, except for the purged citizen complaint from 2007. The trial court noted that it could not recall any complaint for either deputy that was responsive to the *Pitchess* motion. The custodian placed the entirety of Berndt's and Knittel's files in electronic form on a CD, which was ordered sealed and forwarded to this court for review.

B. Standard of review

"'A criminal defendant has a limited right to discovery of a peace officer's personnel records. [Citation.] Peace officer personnel records are confidential and can only be discovered pursuant to Evidence Code sections 1043 and 1045.' [Citation.]" (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 180 (*Yearwood*).) "A defendant is entitled to discovery of relevant information from the confidential records upon a showing of good cause, which exists 'when the defendant shows both "'materiality' to the subject matter of the pending litigation and a 'reasonable belief' that the agency has the type of information sought." [Citation.]' [Citation.]" (*Ibid.*)

When the court finds good cause and conducts an in camera review pursuant to *Pitchess*, it must make a record that will permit future appellate review. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229–1230 (*Mooc*). A custodian is not required to present to the trial court any documents that are "clearly irrelevant" to the *Pitchess* motion. (*Mooc*, *supra*, at p. 1229.) However, if the custodian has any doubt, those documents should be presented to the trial court. (*Ibid.*) "The custodian should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion." (*Ibid.*) A court reporter should memorialize the custodian's statements and any questions asked by the trial court. (*Ibid.*)

C. Analysis

We have reviewed the trial court's in camera examination of Berndt's and Knittel's personnel files. The trial court complied with the procedural requirements of a *Pitchess* hearing. A court reporter was present and the custodian of records was sworn prior to testifying. (*Yearwood, supra*, 213 Cal.App.4th at p. 180.) Although the custodian of records did not bring any documents for the in camera review, the custodian testified that no relevant records existed. This was permissible. (*Mooc, supra,* 26 Cal.4th at p. 1229.)

We have reviewed the sealed personnel files for both Brendt and Knittel. Nothing in these records was subject to disclosure under *Pitchess*. Accordingly, it cannot be said that the superior court abused its discretion in declining to disclose any of these records. (*Mooc, supra,* 26 Cal.4th at p. 1232.)

We next examine the destroyed citizen complaint. An appellate court is required to review the record of the documents examined by the trial court and determine whether the trial court abused its discretion in refusing to disclose the contents of the officer's personnel records pursuant to *Pitchess.* (*Mooc, supra*, 26 Cal.4th at pp. 1228–1229.) A defendant is entitled to "meaningful appellate review" of the confidential files that were before the superior court when it denied the *Pitchess* motion. (*Mooc*, *supra*, at p. 1228.) To facilitate appellate review, the trial court is to preserve the record regarding the documents it examined. The documents can be photocopied and placed in a confidential file, or a sealed list of the documents can be prepared, or the court can state on the record what documents it examined. (*Mooc, supra,* 26 Cal.4th at pp. 1229.)

Here, the trial court stated during the December 18, 2015, hearing that it had previously reviewed the files and it did not recall any complaint that was responsive to appellant's *Pitchess* motion. The court's statement provides some indication that the 2007 citizen's complaint should not have been disclosed. However, based on the totality of this record, we cannot meaningfully determine whether an abuse of discretion occurred

or not. Accordingly, we will examine the prejudicial impact of the failure to disclose the subsequently destroyed citizen's complaint.

In situations where confidential personnel files are subsequently destroyed following a *Pitchess* hearing, a constitutional error does not exist so long as bad faith does not appear as the reason for the destruction. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1221, fn. 10; *People v. Memro* (1995) 11 Cal.4th 786, 831–832.) An abuse of discretion in denying disclosure of confidential records pursuant to *Pitchess* does not result in automatic reversal. Instead, reversal is not required unless there is a reasonable probability a different outcome would result had the evidence been disclosed. (*People v. Gaines* (2009) 46 Cal.4th 172, 182–183.)

Here, we do not find prejudice based on this record. It is common practice for law enforcement agencies to destroy citizen complaints after five years and the *Pitchess* procedures contemplate destruction of such complaints after five years. (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 11; see § 832.5, subd. (b) [requiring retention of citizen complaints for "at least five years"].) There is no statutory right to disclosure of citizen complaints regarding police misconduct that occurred "more than five years before" the charged crime. (Evid. Code, § 1045, subd. (b)(1).) Our Supreme Court has held that the routine destruction of records after five years does not deny due process to a defendant and, to the contrary, tends to show good faith. (*City of Los Angeles v. Superior Court*, *supra*, at p. 12.) Here, the destruction of the missing citizen's complaint appears routine and was done without evidence of bad faith. Further, Brendt's personnel file does not disclose any disciplinary action taken against him that might establish the missing 2007 citizen's complaint was substantiated or had merit.

Finally, Brendt's testimony was irrelevant to appellant's conviction for discharging a firearm in a negligent manner and there was evidence, independent of Brendt's testimony, to support appellant's conviction for misdemeanor resisting arrest in count 5. Knittel testified that he responded to appellant's residence, heard other deputies

giving appellant commands, and appellant was yelling at the deputies. Knittel observed appellant walking away from the deputies and not complying with their commands before he was taken into custody.

Accordingly, we conclude that even if the trial court should have granted appellant's *Pitchess* motion as to the missing 2007 citizen's complaint against Brendt, the failure was not prejudicial as there is no reasonable probability of a different outcome had possible impeachment evidence been disclosed. (*People v. Gaines, supra*, 46 Cal.4th at pp. 182–183.)

II. No Prejudice Exists from the Admission of Bonsack's Statements

Appellant asserts the trial court erred when it allowed into evidence Bonsack's statements regarding an alleged motive for his confrontation with Cummins.

A. Background

During trial, a deputy testified about his discussion with Bonsack, when he responded to her call complaining that the contractor had destroyed their fence. When asked what Bonsack told him, the deputy stated the following: "One of her main concerns was that whoever owns the property to the east of them not be able to develop it because it would obstruct the view that they have." After this testimony was given, defense counsel objected under hearsay and moved to strike. The prosecutor stated the testimony was offered to help prove motive and it was not offered for its truth. The defense objection was overruled. The prosecution again asked the deputy what occurred, and the deputy stated, "Their concern was that they didn't want any homes developed to the east of them because it would obstruct [the] view [from] their home and eventually affect the property value of their home …."

The jury was instructed pursuant to CALCRIM No. 3470 that self-defense was a defense to both assault with a firearm and the negligent discharge of a firearm.

B. Standard of review

An appellate court uses an abuse of discretion standard to review a trial court's ruling regarding the admissibility of evidence. (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.) Even when the trial court errs and allows inadmissible hearsay into evidence, reversal is not warranted if the error was harmless. (*People v. Harris* (2005) 37 Cal.4th 310, 336 (*Harris*).) The federal Constitution is not implicated when an error occurs involving the ordinary rules of evidence. (*Harris, supra*, at p. 336.) Thus, an appellate court reviews allegations of state evidentiary error under the "'reasonable probability' standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. [Citation.]" (*Ibid.*) Under this standard, reversal is required if it is reasonably probable the error affected the trial's outcome. (*Ibid.*)

C. Analysis

"Hearsay evidence is 'evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.' (Evid. Code, § 1200, subd. (a).) Unless an exception applies, hearsay evidence is inadmissible. (*Id.*, subd. (b).)" (*Harris, supra*, 37 Cal.4th at p. 336.)

Appellant asserts that the trial court's ruling was in error because his wife's statement through the deputy can only establish his motive if it was true and offered for its truth, i.e., that he "terrorized his neighbor in order to stop the development of the property." If it was untrue, then appellant did not care whether Cummins developed the property and it did not provide any motive for the attack. He further argues there is no evidence that he "'adopted'" Bonsack's statement. Finally, he contends admission of this evidence was prejudicial because the verdicts suggest that the jury did not believe Cummins's testimony. The defense theory was that appellant acted in self-defense because he was frightened and feared for his safety. He argues the admission of this evidence could have undercut the jury's belief that he acted out of fear, thereby prejudicing his defense.

Respondent contends that the statement was not offered for its truth, but to establish motive. Respondent argues this statement shows Bonsack was concerned, which was a potential motive for appellant to shoot the gun because he believed Cummins's actions were upsetting his family. Finally, respondent asserts that any error in admitting the statement was harmless because it was irrelevant to appellant's conviction of resisting arrest and the record amply supported conviction for his negligent discharge of a firearm.

We need not analyze or address the parties' dispute regarding whether this statement was hearsay evidence or whether appellant adopted the statement. Even when we presume it was error to admit this statement into evidence, any error was harmless.

Appellant's motivation to act was not an element necessary for conviction of either negligent discharge of a weapon (CALCRIM No. 970) or misdemeanor resisting arrest (CALCRIM No. 2656). It was immaterial why appellant acted in order to be convicted in counts 2 and 5. Further, Bonsack's statement was immaterial to appellant's self-defense theory because it had no bearing on whether appellant reasonably believed he (or someone else) was in imminent danger, whether he reasonable believed the immediate use of force was necessary, and whether appellant used no more force than was reasonably necessary. (CALCRIM No. 3470.) Finally, during closing arguments, the prosecutor failed to mention or argue the statement made by appellant's wife. Even if Bonsack's statement had been excluded, it is not reasonably probable a different outcome in this trial would have occurred. (*Harris*, *supra*, 37 Cal.4th at p. 336.) Accordingly, appellant's convictions will not be reversed based on the admission of Bonsack's statement.

III. Sufficient Evidence Supports the Conviction in Count 2

Appellant contends the prosecution presented insufficient evidence that he fired his gun in a negligent manner. He seeks reversal of count 2.

A. Standard of review

For an appeal challenging the sufficiency of evidence, we review the entire record in the light most favorable to the judgment to determine whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt based on "'"evidence that is reasonable, credible, and of solid value …."'" (*People v. Jones* (2013) 57 Cal.4th 899, 960.) In doing this review, we are not required to ask whether we believe the trial evidence established guilt beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) Rather, the issue is whether any rational jury could have found the essential elements of the crime beyond a reasonable doubt after viewing the evidence favorably for the prosecution. (*Ibid*.) We are to presume the existence of any fact the jury could have reasonably deduced from the evidence in support of the judgment. (*Ibid*.)

B. Analysis

A person may not willfully discharge a firearm in a grossly negligent manner, which could result in the injury or death to another person. (§ 246.3, subd. (a).) The term "grossly negligent manner" means conduct that is such a departure from the actions of an ordinarily prudent or careful person under the circumstances as to show a disregard for human life. (*People v. Ramirez* (2009) 45 Cal.4th 980, 989 (*Ramirez*).) The prosecution does not have to establish that an identifiable person was actually in danger of injury or death based on the defendant's grossly negligent action. (*Id.* at p. 990.) Instead, it is sufficient to establish that it was reasonably foreseeable human injury or death could have resulted under the circumstances. (*Ibid.*) Section 246.3 is a general intent crime. (*Ramirez, supra,* at p. 990.)

Appellant argues the evidence was in conflict between his testimony and the testimony from Cummins. He contends the jury must have rejected Cummins's testimony or he would have been convicted of assault with a deadly weapon. He asserts that his own testimony was insufficient to establish the negligent discharge of a weapon because he shot at a tree in a heavily wooded forest with trees, a swamp and a hill in the

background. He maintains that even if he fired his gun 20 feet off the ground, the evidence remains insufficient for a conviction because he was a good shot and he fired into a wooded area. We disagree.

Appellant informed law enforcement that he fired his weapon twice outside on the night in question in an easterly direction, at some trees. Appellant's stated intent was to scare Cummins, but not to kill him. An unknown number of homes existed within 1,000 feet to the east and west of appellant's property. A road, Highway 108, and more residences existed to the south of appellant's property.

Cummins testified that appellant threatened to kill him, although Cummins did not take the threat seriously. Appellant walked away and, approximately five to 10 minutes later, Cummins heard a loud boom followed by noise in the brush approximately four feet from him. Cummins saw appellant near his barn, and appellant started running. Cummins began running away, and he heard a second shot and noise in front of him in the direction he was running.

This record establishes that a reasonable jury could properly determine appellant willfully discharged a firearm in a grossly negligent manner, which could have resulted in the injury or death to another person. (§ 246.3, subd. (a); *Ramirez, supra,* 45 Cal.4th at p. 989.) This conclusion is not altered because the jury found appellant not guilty in count 1 of assault with a deadly weapon under section 245, subdivision (a)(2).

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240; see *People v. Licas* (2007) 41 Cal.4th 362, 366.) Based on appellant's testimony that he never intended to hurt Cummins, but only scare him, the jury could have reasonably determined appellant did not attempt to commit a violent injury, but he nevertheless negligently discharged his gun, which could have resulted in serious injury or death. The jury was instructed pursuant to CALCRIM No. 105 that it could believe all, part or none of any witness's testimony. It was permissible for the jury to accept some, but not all, of Cummins's testimony.

The jury had evidence that was reasonable, credible, and of solid value to convict appellant in count 2, and a rational jury could have found the essential elements of the crime beyond a reasonable doubt after viewing the evidence favorably for the prosecution. (*People v. Johnson*, *supra*, 26 Cal.3d at p. 576.) Accordingly, count 2 will not be reversed for insufficient evidence.

IV. A *Brady* Violation Did Not Occur

Appellant maintains that the prosecution violated its due process obligations under *Brady* by failing to disclose evidence of domestic violence by Cummins. He seeks reversal of his convictions.

A. Background

1. The pretrial discovery issues

Prior to trial, the prosecution filed a motion in limine to exclude the following evidence: (1) Cummins's 1986 expunged conviction for second degree burglary; (2) Cummins's 1988 acquittal of section 242 and section 245 charges; (3) Cummins's 1991 misdemeanor conviction of either section 243, subdivision (d), or section 242; and (4) Cummins's two potential section 273.5, subdivision (a), cases, which were rejected for prosecution for insufficient evidence in 1993 and 2005, respectively.

Prior to trial, appellant filed a motion for discovery pursuant to *Brady*, *supra*, 373 U.S. 83. Appellant sought the identity of a "'Jane Doe'" who appeared in a 2004 police report in which she complained to law enforcement that Cummins, her boyfriend, had slapped her face twice, broke her keychain, and threw her keys from her car when they sat together in a parking lot. She requested law enforcement take no action with a battery charge. The report noted slight injuries to Doe's lips.

Included in the motion was a 1993 report from law enforcement where a former girlfriend of Cummins said they were involved in an argument, and he grabbed her throat, shoved her against objects, and then hit her face. The victim indicated Cummins had slapped her twice before, but nothing like this incident. She said her injuries included a

black eye, cut lip, swelling and bumps to the back of her head. She did not want to press charges.

Appellant filed a pretrial motion in limine in which he sought leave to introduce evidence of Cummins's domestic violence from 1993 and 2005. At the hearing, defense counsel informed the court that the defense would not call the alleged victims from the 1993 and 2005 incidents as trial witnesses. Because those incidents did not result in convictions, the trial court ordered that no mention of those two incidents would occur during the trial. The court ruled that Cummins's criminal history was excluded at trial unless it became relevant for impeachment.

2. The posttrial discovery issue

After the trial in this matter ended, an undisclosed juror contacted appellant's defense counsel and indicated a deputy sheriff had escorted the juror to the parking lot. The deputy stated he had investigated a case where Cummins had committed "'stalking,'" and the juror was concerned that they convicted the wrong person. Appellant's counsel had the deputy interviewed, and the deputy recalled an investigation two or three years earlier when Cummins's wife had complained of stalking by Cummins. His wife had left Cummins and was hiding at a friend's house. Cummins appeared at that house, knocked, and the wife's vehicle was subsequently broken into, and her purse and cell phone were missing. When the deputy contacted Cummins at his residence, Cummins returned the purse, claiming some woman had found it and brought it to the house. The deputy prepared a report and forwarded it to the district attorney's office. Based on this new information, appellant's defense counsel filed both a motion for relief pursuant to *Brady* and a concurrent motion for new trial.[5]

The prosecutor opposed the motion for relief pursuant to *Brady*, indicating he was never personally aware of this report prior to trial, but admitted the report was discovered

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[5] A discussion of the motion for new trial appears below in part V.

in a records database following receipt of appellant's motion. The prosecution contended that the failure to disclose the report was not a *Brady* violation.

The hearing date on appellant's motions were continued. Appellant's defense counsel filed a second *Brady* motion, which included additional information. The defense investigator had spoken with the friend of Cummins's wife (in the residence where his wife was staying during the incident) and the friend recalled the name of a prior girlfriend of Cummins. The investigator made contact with that former girlfriend, Bridgett Northcutt. Northcutt knew about Cummins's activities on his property and she was familiar with his dispute with appellant. She knew Cummins attempted to clear trees from his land without a permit, and he tried to sabotage the pond by filling it with dirt and stumps. Cummins knew appellant turned him in to the authorities, which made Cummins mad. Cummins told Northcutt that he got into an argument with appellant over the fence and Cummins called appellant names to provoke a fight in order to get appellant arrested. Cummins said he put a trailer on his property, where appellant's family could see it just to provoke them. Northcutt was with Cummins when he would park his truck right at the fence line and watch appellant's family. Cummins wanted to provoke appellant's family to "get his way." Northcutt noted that during their relationship, Cummins assaulted her twice.

3. The trial court's ruling regarding relief pursuant to *Brady*

During appellant's motion for relief pursuant to *Brady*, the trial court heard testimony from the prosecution's lead investigator and the prosecutor regarding the failure to disclose the report regarding Cummins's alleged stalking. Appellant's counsel had Northcutt available to testify, but offered her declaration into evidence. The prosecutor declined to cross-examine Northcutt. The court accepted Northcutt's declaration as support for appellant's motion. Northcutt's declaration was consistent with her earlier statements to the investigator.

The defense argued that Northcutt's declaration showed she possessed evidence that was germane to the trial defense regarding how Cummins conducted himself on the property and Cummins's efforts to antagonize appellant. Northcutt also identified behavior that would qualify as moral turpitude. She was discovered through information contained in the 2011 report regarding Cummins's wife after the defense interviewed the owner of the house. As such, defense counsel submitted that the missing information was *Brady* material, which should have been disclosed.

The prosecutor argued that the missing 2011 report did not demonstrate moral turpitude because Cummins was merely lingering outside a house in the early morning hours and it did not establish stalking. Nothing in the 2011 report mentioned Northcutt and the prosecution team was unaware of her. The prosecutor contended Northcutt was too attenuated from the missing report to create a *Brady* violation.

The trial court noted that the date of the offense was October 23, 2009, but, according to Northcutt's declaration, she ended her relationship with Cummins in 2008. Nothing in the record indicated that Northcutt filed a report with law enforcement. The court noted that the missing report had a date of January 8, 2011, which was about 15 months after the date of the negligent discharge. Cummins was not identified as a suspect in the missing report. The court stated a lot of evidence was presented at trial regarding the nature of the conflict between Cummins and appellant, including the ongoing dispute and how they conducted themselves. The court commented that a jury trial is not intended to present the history of every single event that has ever occurred between the people, and limitations are in place to prevent undue consumption of time, confusion, or prejudice. The court determined that no *Brady* error was committed under the totality of all the circumstances. Appellant's motion for relief was denied.

B. Standard of review

A """"*Brady* violation""""" refers broadly to any breach of the prosecution's obligation to disclose exculpatory evidence. (*People v. Letner and Tobin* (2010) 50

Cal.4th 99, 175.) The prosecutor's duty to disclose such evidence exists even if the defense made no request concerning the evidence. (*United States v. Agurs* (1976) 427 U.S. 97, 107.) The duty also encompasses impeachment evidence. (*United States v. Bagley* (1985) 473 U.S. 667, 676.)

A *Brady* violation does not occur "'"unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."'" (*People v. Letner and Tobin*, *supra*, 50 Cal.4th at pp. 175–176.) Three components comprise a true *Brady* violation: first, the disputed evidence must be favorable to the accused, either because it is exculpatory or impeaching; second, the state must have suppressed the evidence either willfully or inadvertently; and finally, prejudice must have occurred. (*People v. Letner and Tobin*, *supra*, at p. 176.)

In this context, prejudice refers to the materiality of the evidence regarding the issue of guilt and innocence. (*People v. Letner and Tobin*, *supra*, 50 Cal.4th at p. 176.) Materiality requires more than showing the suppressed evidence would have been admissible, that the conviction was more likely in the absence of the suppressed evidence, or that the outcome of the trial might have changed had the suppressed evidence been used to discredit a witness's testimony. (*Ibid.*) Instead, a defendant must show a '"'"reasonable probability of a different result."'"' (*Ibid.*) The issue is more than whether the defendant would have received a different verdict with the evidence but, rather, whether the defendant received a fair trial in the absence of the evidence. (*Kyles v. Whitley* (1995) 514 U.S. 419, 434.) In other words, was the verdict "worthy of confidence." (*Ibid.*) Our high court has found a *Brady* violation where the suppressed evidence "would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense." (*Kyles v. Whitley*, *supra*, at p. 441.)

An appellate court independently reviews whether a *Brady* violation occurred, but the trial court's findings of fact are given great weight if they are supported by substantial

evidence. (*People v. Letner and Tobin*, *supra*, 50 Cal.4th at p. 176.) The defendant has the burden of showing materiality. (*In re Sassounian* (1995) 9 Cal.4th 535, 545.)

C. Analysis

Appellant argues the prosecution's failure to inform him about the 2011 incident meant he did not learn about Northcutt until after the trial. He contends this evidence could have been used at trial to show "a pattern of violent and vindictive acts by Cummins" consistent with appellant's testimony, which would have bolstered his self-defense claim. He maintains that the suppressed impeachment evidence was material because Cummins was the key prosecution witness. He asserts that, if he had been permitted to show Cummins's violent nature, it would have strengthened his argument that Cummins came after him with a pipe, stopped and called the fencing contractor, and said he was going to have the contractor harm appellant. He alleges this evidence would have likely had a negative effect on how the jury viewed Cummins's testimony, and the prosecution's case would have been considerably weaker. He believes the suppression of this evidence undermines confidence in the outcome of the trial.

Respondent expressly concedes that the 2011 report was within the prosecution's constructive possession and impliedly concedes that the report should have been disclosed. Respondent, however, argues no *Brady* violation occurred because the 2011 report did not contain any favorable exculpatory or impeachment evidence. Further, respondent contends the 2011 report did not involve or mention Northcutt, so the prosecution had no knowledge or possession of Northcutt's potential testimony. Respondent also questions whether Northcutt's testimony would have been admissible pursuant to Evidence Code section 352. Finally, respondent maintains that it is not reasonably probable Northcutt's potential testimony would have produced a different result.

We need not resolve the parties' dispute regarding whether or not Cummins's actions in the 2011 report involved acts of moral turpitude sufficient to qualify as

impeachment evidence. We also need not resolve the parties' dispute regarding whether or not the defense's discovery of Northcutt from the 2011 report triggered *Brady*. Finally, we need not resolve the parties' dispute regarding whether Northcutt's proposed testimony would have been admissible. There is no reasonable probability a different result would have occurred regarding the convictions in counts 2 and 5 had the 2011 report been disclosed prior to trial.

First, appellant does not contend that Northcutt's evidence was material to the conviction for resisting arrest. Moreover, regarding negligent discharge of a weapon, the jury was instructed it could consider whether appellant acted in self-defense. The jury was told it could consider whether appellant knew that Cummins had threatened or harmed others in the past in deciding whether appellant's conduct and beliefs were reasonable.

There is no evidence that appellant knew Northcutt. There is no evidence appellant knew that Cummins had allegedly threatened or harmed Northcutt in the past. There is no evidence that appellant knew Cummins had allegedly informed Northcutt of his plans to provoke appellant. The evidence from Northcutt's proposed testimony had no bearing on whether appellant's conduct and beliefs were reasonable. A different result was not reasonably probable with this evidence regarding the convictions in counts 2 and 5. Appellant cannot establish the materiality of this suppressed evidence. (*People v. Letner and Tobin*, *supra*, 50 Cal.4th at p. 176.)

Moreover, our Supreme Court has held that the suppression of possible impeachment evidence is material under *Brady* where the witness at issue provided the only evidence linking the defendant to the crime or if a critical element in the prosecution's case would have been undermined based on the likely impact of the witness's credibility. (*People v. Letner and Tobin*, *supra*, 50 Cal.4th at p. 177.) Here, appellant's own testimony established that he fired his rifle twice on the night in question, and he explained how and why he did so. Cummins's testimony was not the

only evidence linking appellant to his conviction for negligently discharging a firearm. A critical element in the prosecution's case in counts 2 and 5 would not have been undermined based on the likely impact of Cummins's credibility stemming from Northcutt's proposed testimony.

Appellant relies on *In re Sodersten* (2007) 146 Cal.App.4th 1163 (*Sodersten*) as authority establishing a *Brady* violation. This reliance is misplaced. In *Sodersten*, the prosecution failed to disclose tape-recorded statements of the two key trial witnesses against the defendant, who was convicted of a special circumstance murder and related offenses. The recorded statements contained inconsistent statements, as well as admissions of lying and evidence of one witness's coercive interrogation. (*Sodersten, supra*, at p. 1169.) On appeal, this court determined that the tape recordings could have been "devastating to the prosecution's case." (*Id.* at p. 1226, fn. omitted.) The recorded statements could have raised serious questions about the veracity of the two key witnesses. (*Id.* at pp. 1228–1229.) *Sodersten* determined the missing evidence reasonably called into question the confidence in the verdict, and there was a reasonable probability of a different result. Accordingly, the judgment was vacated. (*Id.* at p. 1236.)

Here, unlike in *Sodersten*, this record does not establish that appellant received an unfair trial in the absence of this evidence and appellant's verdicts are worthy of confidence. *Sodersten* is factually distinguishable and does not dictate reversal. Based on the verdicts rendered, the suppressed evidence would not have resulted in "a markedly weaker case for the prosecution and a markedly stronger one for the defense." (*Kyles v. Whitley*, *supra*, 514 U.S. at p. 441.) Accordingly, appellant has not met his burden of showing materiality and a *Brady* violation does not appear on this record. Appellant's convictions will not be reversed.

V. The Trial Court Did Not Err in Denying the Motion for a New Trial

Appellant maintains the trial court erred when it denied his motion for a new trial.

A. Background

Appellant brought a motion for a new trial pursuant to section 1181. The new trial motion was filed and heard concurrently with his motion for relief pursuant to *Brady*. In the new trial motion, appellant contended that Cummins's past instances of moral turpitude were very remote in time, but the 2011 report was more recent and served to "'freshen'" the older acts, and it presented a consistent pattern of conduct that damaged Cummins's credibility. Appellant asserted that prejudicial prosecutorial misconduct occurred when the 2011 report was not disclosed, and the defense could have used it to show a "consistent string of acts of moral turpitude" by Cummins. Appellant believed this evidence would have resulted in a different and more favorable verdict for him.

During oral arguments, appellant's counsel emphasized that Northcutt had information germane to the defense, and she was only discovered through the 2011 report. Because the information was not provided to the defense at a time it was useful, i.e., before trial, a new trial motion was appropriate.

The trial court noted that both the motion for relief pursuant to *Brady* and the new trial motion were intertwined. After denying the motion for relief pursuant to *Brady*, the court stated that no basis existed for a new trial after viewing the totality of the evidence. The motion for new trial was denied.

B. Standard of review

The law looks with disfavor upon a motion for new trial based on newly discovered evidence because the litigation must end at some point. (*People v. Williams* (1962) 57 Cal.2d 263, 274.) On appeal, a deferential "'abuse-of-discretion standard'" is used to review a trial court's ruling on a motion for a new trial. (*People v. Thompson* (2010) 49 Cal.4th 79, 140.) The ruling will not be reversed "'"absent a manifest and

unmistakable"'" abuse by the trial court. (*Ibid.*) The trial court retains complete discretion when ruling on such a motion. (*Ibid.*)

The defendant has the burden on such a motion to establish it is "probable that at least one juror would have voted to find him not guilty had the new evidence been presented." (*People v. Soojian* (2010) 190 Cal.App.4th 491, 521.)

C. Analysis

Section 1181, subdivision 8, permits a trial court to grant a new trial for newly discovered evidence that is material to the defendant, and which could not have been discovered and produced at trial with reasonable diligence. The Supreme Court has set forth the following five factors for a trial court to consider: (1) whether the evidence, and not just its materiality, is newly discovered; (2) whether the evidence is cumulative; (3) whether the evidence will render a different result probable on retrial; (4) whether the party could not have discovered and produced the evidence at trial with reasonable diligence; and (5) whether the facts are shown by the best evidence. (*People v. Delgado* (1993) 5 Cal.4th 312, 328 (*Delgado*).)

A trial court should grant a motion for new trial when the newly discovered evidence contradicts the strongest evidence introduced against the defendant. (*Delgado*, *supra*, 5 Cal.4th at p. 329.) However, a trial court is permitted to consider the credibility and the materiality of the new evidence when determining whether its introduction in a new trial would render a different result reasonably probable. (*Ibid.*)

Appellant asserts that Northcutt was a newly discovered witness who had relevant information regarding Cummins's violent past and the lengths Cummins would go to "'get his way.'" Appellant contends this evidence would have "profoundly changed the outcome" of the case. He argues this was a close case and this evidence could have "tipped the balance" towards believing his argument that he fired the shots in self-defense. He maintains that this evidence shows he was wrongly convicted, and the trial court erred, resulting in a denial of due process.

Respondent asserts that the 2011 report does not mention Northcutt, so the report cannot be the reason why appellant failed to discover her testimony sooner. Respondent also argues Northcutt's testimony was cumulative because numerous witnesses testified about the animosity between Cummins and appellant, and her testimony would likely have been inadmissible under Evidence Code section 352. Finally, respondent contends this new evidence would not have rendered a different result probable on retrial because it had no relevance to the conviction for resisting arrest and it would not have altered whether appellant negligently discharged his weapon.

We need not resolve the parties' dispute regarding whether or not the 2011 report was newly discovered evidence, whether Northcutt's testimony would have been cumulative to the trial evidence, or whether her testimony would have been admissible. When we presume, without so deciding, all of these disputed issues in appellant's favor, appellant's claim still fails.

Northcutt's proposed testimony had no bearing on whether appellant intentionally shot a firearm, whether he did the shooting with gross negligence, whether the shooting could have resulted in the injury or death of a person, or whether he acted in self-defense. (CALCRIM No. 970). The trial court acted well within its discretion in finding that Northcutt's proposed testimony would not have rendered a different result probable on retrial. Based on this record, the trial court also acted well within its discretion in implicitly finding it was not probable that at least one juror would have voted to find appellant not guilty had Northcutt's proposed testimony been presented. (*People v. Soojian, supra*, 190 Cal.App.4th at p. 521.) Accordingly, appellant is not entitled to reversal of his convictions.

VI. The Restitution Fine and Probation Revocation Restitution Fine Do Not Violate Appellant's Ex Post Facto Rights

Appellant asserts the trial court violated his ex post facto rights, when it imposed a restitution fine and parole revocation fine in the amount of $280 because his crime occurred well before the change in the law.

A. Background

The incident resulting in appellant's convictions occurred in 2009. Sentencing occurred in March 2013. In imposing sentence, the trial court read and considered the report and recommendations from the probation department. The probation officer recommended that appellant pay fines pursuant to sections 1202.4, subdivision (b), and 1202.44. The probation report did not recommend an amount. At sentencing, the court imposed a $280 restitution fine (§ 1202.4, subd. (b)) and a $280 stayed probation revocation restitution fine (§ 1202.44).

B. Analysis

Appellant contends the respective $280 fines constitute ex post facto punishment. He claims the trial court intended to impose the minimum fines when it placed him on probation and ordered the minimum fine as if he had committed the crime in 2013. He argues his counsel rendered constitutionally ineffective assistance of counsel if his claim is deemed waived on appeal.

Respondent concedes that the minimum restitution fine under section 1202.4, subdivision (b), was $200 in 2009. However, respondent argues appellant failed to object to the imposition of these fines so his claim has been forfeited on appeal. Respondent further asserts the trial court had the discretion to impose a fine greater than $200 so the imposition of a $280 fine was well within the trial court's discretion. Finally, respondent contends appellant's defense counsel did not render constitutionally ineffective assistance of counsel.

"It is well established that the imposition of restitution fines constitutes punishment, and therefore is subject to the proscriptions of the ex post facto clause and other constitutional provisions." (*People v. Souza* (2012) 54 Cal.4th 90, 143.) A restitution fine is to be imposed under the law applicable at the time of the offense and not at the time of sentencing. (*Ibid.*) A fine that was properly imposed under the law at sentencing, but improper under the law at the time of the offense violates ex post facto principles. (*Id.* at pp. 143–144.)

Effective January 1, 2013, the Legislature increased the minimum restitution fine in section 1202.4, subdivision (b)(1), to $280. (Stats. 2012, ch. 868, § 3.) In 2009, when appellant committed these crimes, the minimum fine was $200. (Former § 1202.4, subd. (b)(1).) However, under former section 1202.4, the trial court could impose a fine between $200 and $10,000. (*Ibid.*) The probation revocation restitution fine must equal the restitution fine. (§ 1202.44.)

Here, the $280 fines imposed were proper under the law at the time appellant committed these offenses. Appellant does not challenge or contend that the trial court abused its discretion in the amount of these fines. Because the amount of these fines were permissible in 2009, appellant has not established an ex post facto violation of his rights.

DISPOSITION

The judgment is affirmed.

_____
KANE, Acting P.J.

WE CONCUR:

_____
FRANSON, J.

_____
SMITH, J.